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ATTACHMENTS.

1. *Action—Malicious Attachment.*—To sustain an action for maliciously suing out an attachment, it must be shown by satisfactory evidence that the plaintiff in the attachment knew that he had no cause of action whatever against the defendant, and that he also acted maliciously therein.—Alexander v. Harrison et als., 258.

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3. *Practice—Publication.*—The notice under an order of publication, issued in a suit by attachment, must state that the defendant's property has been attached—R. C. 1855, p. 246, § 23; and if this be omitted, the judgment rendered upon such notice will be void.—Durossett's Adm'r v. Hale, 346.

4. *Levy of Lands.*—The levy of an attachment upon lands of the defendant will not be void because the sheriff fails to notify the tenants in possession, or give a a reason for such failure. The giving of such notice constitutes no essential part of the levy.—*Id.*

5. *Bond—Practice.*—Before a writ of attachment can be issued, the plaintiff must give a bond with security as required by the statute. If the bond be insufficient, the suit may be dismissed if the plaintiff fail to file a good bond when required by the order of the court, upon proper motion and notice—R. C. 1855, p. 242, §§ 9 & 10. A bond signed by the plaintiff alone is not a nullity, so as to dispense with motion and notice.—Jasper County v. Chenault et al., 357.

6. *Non-residence—Domicil.*—A man's residence, like his domicil, or usual place of abode, means his home, to and from which he goes and returns daily, weekly, or habitually, from his ordinary avocations and business, wherever carried on. The indefinite abode of a party in this State, and doing business herein, but without the intention of remaining here permanently, does not make him a resident of this State. Under the provisions of the Attach-

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7. *Residence — Evidence.* — The fact that a party describes himself in his business papers as being located in this State, when he has a permanent home in another State, is not competent evidence to prove that he is a resident of this State.—*Id.*

8. *Practice — Publication — Judgment.*—Where the defendant, a non-resident, is brought into court by an order of publication, and does not appear, the plaintiff cannot have any other or different relief than that prayed in his petition. If after publication the plaintiff amend his petition and take a different judgment from that originally prayed, the judgment will be null and void—R. C. 1855, p. 1280, § 12. After service of notice by publication, the defendant cannot be held to have any notice of amendments to the petition.—Janney v. Spedden et al., 395.

9. *Jurisdiction—Practice—Process—Publication.*—A judgment *in personam* for a debt against a non-resident of this State, obtained upon a mere order of publication, without the service of any process, or of an attachment upon the defendant's property, is a judgment without process and void. A party summoned as garnishee by execution upon such judgment may defend by showing the invalidity of the judgment for want of jurisdiction. The statute R. C. 1855, p. 1224, § 13, was not intended to give such jurisdiction; it applied only to cases where the court had jurisdiction over property sought to be affected by the suit.—Smith v. McCutchen, Garn., 415.

10. *Process — Jurisdiction.* — Judgments obtained on an attachment process against non-residents will bind the property attached, but will not be treated as evidence of indebtedness, or as operative in any manner *in personam*, for there is no power of adjudication. - *Id.*

11. *Delivery Bond — Action.* — The legal effect of the taking a bond for the delivery of property attached, under the provisions of section 29, p. 247, R. C. 1855, is to relieve the officer of the care and custody of the property, and to give the possession to the parties executing the bond. If, upon execution after judgment, the obligors deliver the property to the officer, to be sold or otherwise disposed of in obedience to the order of court, the condition of the bond is satisfied, and no cause of action remains to the sheriff or the attaching creditor. If there be a breach of the bond, the sheriff under the order of the court, upon the happening of the contingency, must assign the bond to the plaintiff, who may have judgment, upon motion, for the value of such property. Damages to the property by the obligor in the bond gives no cause of action to the sheriff or the attaching creditor.—Jones to use, &c., v. Jones et al., 429.

12. *Landlord and Tenant.* — The object of the statute in authorizing the landlord to sue out an attachment, was to prevent the tenant from removing his property from the permises for any purpose or any pretext, if he thereby exposed the landlord to the danger of losing his rent. The affidavit should state affirmatively the facts relied on as grounds for the attachment. (R. C. 1855, p. 1015.)—Kleun v. Vinyard, 447.

13. *Cash Sale.*—To authorize an attachment under subdivision 13, § 1, p. 239, R. C. 1855, it must be stipulated by the contract, that the price or value of

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the article sold was to be paid on delivery. If credit was given or intended, the creditor must pursue his remedy by an ordinary action at law. A promise to give a note payable at a future date, is not a promise to pay on delivery.—Harlow v. Sass, 34.

14. *Garnishee.*—An attaching creditor only acquires such rights against the garnishee as the debtor possessed at the date of the garnishment; and no process can place the garnishee in a worse position than he would have occupied had he been directly sued by the debtor in the attachment suit.—Weil et al. v. Tyler et al., Garn., 545.

15. *Garnishee—Judgment—Estoppel.*—A judgment against a garnishee in a suit by attachment, or under an execution, will not protect him against a subsequent recovery in favor of one who had previously to the garnishment taken an assignment of the debt from the defendant.—Weil et al. v. Tyler et al., Garn., &c., 558.

16. *Garnishee—Note.*—Where the garnishee by his answer admits that he had given a note to the defendant, but also stated that he did not know who held the note at the date of the garnishment, the ownership of the note is a material issue in the case, and the burden of proof is upon the plaintiff to show that at the service of the garnishment the defendant was the owner and holder of the note.—*Id.*

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B

BILLS AND NOTES.

1. *Endorsee—Title.*—A pre-existing debt or an antecedent liability incurred by an endorsee of a negotiable promissory note assigned before maturity, is a sufficient consideration to support the title of such endorsee.—Boatman's Sav. Inst. v. Holland, 49.

2. *Consideration.*—Incurring expense and assuming liabilities by the promisee, in consequence of the promise, is a sufficient consideration for the promise by the maker of a note.—Koch v. Lay, Garn., 147.

3. *Demand—Protest.*—A security signing a note as joint maker, is not discharged for failure to demand payment and to give notice of its refusal.—Buchner v. Liebig et als., 188.

4. *Equity—Trust—Description of Payee.*—Where the payee holds a note or instrument in fiduciary capacity, and the purchaser or endorsee has notice of the fact, and also that the trustee is committing a breach of faith, the purchaser will not be protected.—Renshaw v. Wills, 201.

5. *Trust—Notice—Equity.*—Where a note executed by the purchaser at a partition sale to "J. S., sheriff," was secured by a deed of trust upon the property sold, if the deed of trust show the consideration of the note, and the endorsee of the sheriff purchasing the note received also the deed of trust which showed the consideration for the note, or knew of the deed when he purchased the note, he will be held to have notice of the fiduciary character of the sheriff, and will not be considered as a holder in good faith. The sheriff in taking the note is a trustee executing a trust devolved upon him by law.—*Id.*

BILLS AND NOTES (*Continued*).

6. *Equities.*—A party receiving notes after they are past due, is put upon inquiry, and will be considered as having taken them with full notice of all the infirmities or equities which attach to them.—Chappell v. Allen et als., 213.
7. *Protest—Notice.*—If, either by express terms, or by the necessary or natural implication of the language used, the notice of protest of a bill of exchange contains in substance a true description of the bill, with a statement of its presentment and dishonor, and that the holder looks to the party to whom the notice is sent for payment, it is sufficient. An immaterial variance in the description of the bill will not vitiate the notice; to be fatal, the variance must be such that, under the attendant circumstances, the notice conveys no adequate or sufficient knowledge to the party of the identity of the particular bill which has been dishonored.—McCune v. Belt at al., 281.
8. *Notes for Property—Demand—Contracts.*—Notes payable in money absolutely do not require any demand of payment before commencing suit; but notes payable in specific articles of personal property, when neither time nor place of payment are specified, are not subject to this rule, and before a suit can be maintained, a specific demand of payment, in accordance with the terms of the contract, must be made.—Weil et al. v. Tyler et al., Garn., 545.

See CONTRACTS. MORTGAGES. EQUITY.

C

CONSTITUTION.

1. *Education—Officer.*—By the terms of the Constitution, art. 5, § 8, all officers appointed by the Governor to fill a vacancy, unless otherwise provided by law, were to hold their offices until their successors were duly elected, or appointed, and qualified. By virtue of this provision, the Superintendent of Public Instruction was continued in office until his successor was appointed or elected, and qualified.—State ex rel. Robinson v. Auditor, 192.
2. *Vacating Ordinance—Circuit Attorneys.*—The offices of Circuit Attorneys having been vacated by the ordinance of March 17, 1865, and having been filled in the manner therein provided, their term will not be required to be legally filled at the election in November, 1866. Holmes, J., dissenting.—Circuit Attorneys' Election, 419.
3. *Elections—Voters—Registration.*—A legally qualified voter, under the terms of the Constitution, must be registered as such in the election district in which he resides.—State ex rel. Garesché v. Bond, 425.
4. *Contracts—Retrospective Laws.*—The Constitution forbids the passage of any law *ex post facto*, or impairing the obligation of contracts, or retrospective in its operation. A statute which takes away any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect to transactions already past, is retrospective. A statute, amendatory of the charter of an insurance company, which declares that the certificate, signed by the president and secretary of the company and attested by the corporate seal, that the party named

CONSTITUTION (*Continued*).

therein is indebted to the company in the sum stated, shall be conclusive evidence of the facts therein stated, is, as to all causes of action originating prior to the statute, retrospective in its operation and void.—Hope Mut. Ins. Co. v. Flynn, 483.

5. *Eminent Domain — Action — Trespass.*—Lindell's Adm'r v. Han. & St. Jo. R.R. Co., 36 Mo. 543, P. 1, affirmed.—Leary v. Hann. & St. Jo. R.R. Co., 485.

See ELECTION. ADMINISTRATION. QUO WARRANTO.

CONTRACTS.

1. *Damages.*—Where, in a suit for work and labor done, the plaintiff abandons the special contract, and claims for a *quantum meruit*, he will be entitled to recover only the value of the work, after deducting the damages sustained by the defendant from the failure of plaintiff to comply with his contract, the value of the work being limited by the contract price.—Lamb v. Brolaski, 51.

2. *Condition.* — A party contracting with an outgoing tenant to pay for the improvements, in case he shall obtain a lease, is not liable upon his contract unless he obtain a lease of the premises.—Josse's Adm'r v. Newman, 43.

3. *Bailment — Agency — Bank — Negligence.*—A bank receiving promissory notes from its depositors for collection, is responsible for the negligence of a notary appointed by it for a year, and from whom it required a bond for the faithful discharge of his duties, in failing to give notice to an endorser of a negotiable promissory note of a demand upon and refusal of payment by the maker, by which the endorser was discharged. The notary is not, in such a case, an independent officer, in the discharge of a duty devolved upon him by law, but is the agent of the bank.—Gerhardt v. Boatman's Sav. Inst., 69.

4. *Mortgages — Auction Sales — Deeds of Trust.*—Where property offered for sale at auction by a trustee in a deed of trust is knocked down to the highest bidder, the sale may be enforced in equity in a suit for a specific performance, or the bidder may be held liable at law for the damages sustained.—Dover v. Kennerly et al., 469.

5. *Mortgage — Trustee's Sale.* — When the purchaser to whom the property is struck off at a trustee's sale at auction fails to complete his purchase, the property must be re-advertised for sale—Barnard v. Duncan, *ante*, 170.—*Id.*

6. *Slavery — Warranty — Note.* — A note was given in consideration of the sale of a slave, the vendor, by bill of sale, warranting that the slave was a slave for life. Subsequent to the sale, slavery was abolished in this State by the ordinance of the Convention. *Held*, that the covenant did not warrant against the action of the State in abolishing the status of slavery, and that there was no failure in the consideration of the note.—Phillips v. Evans, 305.

See BILLS AND NOTES. MORTGAGES.

CONVEYANCES.

1. *Evidence.* — An instrument affecting lands, the execution of which is not

CONVEYANCES (*Continued*).

proved in accordance with the statute, is not entitled to be recorded, and a certified copy of the record is not admissible in evidence.—Patterson v. Fagan et al., 70.

2. *Lands — Tenants in common.* — One tenant in common cannot convey, by metes and bounds, a distinct portion of the whole tract held in common with others, so as to prejudice his co-tenants or their assignees, although the deed may bind him, and those claiming under him, by way of estoppel. But where several persons are tenants in common of separate and distinct parcels of land, one of the tenants may convey all his undivided interest in any one of the distinct parcels.—Primm et als. v. Walker, 94.

3. *Lands — Tenants in common.* — Where one tenant in common laid out an "addition," dividing the land into lots and blocks, and filed a plat dedicating the streets and alleys in accordance with the statute, and the other tenant recognized the addition and plat, and made deeds for his undivided interest in several lots, these acts of the parties have the effect to make a division of the tract, as between themselves, into several and distinct parcels, and they become tenants in common of each several parcel or lot by itself.—*Id.*

4. *Contract—Patent and Latent Ambiguity.*—To render a deed or other instrument void for uncertain description, the ambiguity must be patent and appear on the face of the instrument; but where the uncertainty is raised by matter outside of the instrument, the ambiguity is latent, and may be explained by the application of extrinsic evidence. (See Bell v. Dawson, 32 Mo. 79.)—Hardy v. Matthews, 121.

5. *Guardians and Wards—Probate Courts—Jurisdiction.*—The County Court by the statute of 1845 had no jurisdiction to authorize a guardian to sell the real estate of his ward for his support, and a purchaser at such sale takes no title. The power to sell given by the statute is to procure and complete the education of the minor—R. C. 1845, p. 551. The guardian occupied a relation of trust towards his ward which precluded him from purchasing at his own sale, and the county clerk could not execute to the guardian a deed for the premises sold.—Beal v. Harmon, 435.

6. *Husband and Wife—Ejectment.*—A deed executed by husband and wife, conveying the wife's real estate, although defectively acknowledged so as not to pass the fee of the wife, passes the husband's life estate, and is good to maintain or resist an action of ejectment.—*Id.*

7. *Patent—Description.*—Although there may be repugnancy in the descriptive calls of the land granted by a patent, yet if enough of description remain to identify the location of the land, it will be sufficient.—Fenwick v. Gill, 510.

8. *Confirmation—Grant.*—A grant may be made by law as well as by a patent pursuant to law; and a confirmation by law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*. When an act of Congress confirming lands also authorizes patents to issue, the production of the patent is not absolutely necessary for the purpose of showing a grant of title.—*Id.*

9. *Grants by United States — Fraud.* — Courts cannot inquire into the reasons and motives of Congress in passing an act confirming or granting lands to an individual.—*Id.*

See LANDS AND LAND TITLES. STATUTE OF FRAUDS. MORTGAGES. EJECTMENT.

CORPORATIONS.

1. *Notice—Evidence.*—The knowledge acquired by the officers of a corporation while in the discharge of their official duties, is the knowledge of the corporation itself.—Mechanics' Bk. v. Schaumburg et al., 228.
2. *Agent—Power of Attorney.*—A. gave W. a power of attorney, in her name, to borrow money, draw, sign and endorse bills and notes, and to execute deeds, &c. B. also gave W. a similar power. W., who was president of the bank, and kept an account with it in his own name, presented these powers to the bank as his authority to sign the names of A. and B. to joint notes, the proceeds of which notes went to W., of which the bank had notice. *Held*, that as the officers of the bank had, by the powers of attorney, notice of the extent of W.'s authority, the notes were not given in pursuance of the authority, and that the bank had notice of the want of power.—*Id.*

CORPORATIONS, RAILROAD.

Negligence—Killing Stock.—In an action against a railroad company for negligence in killing stock, the plaintiff may prove actual negligence, or show the facts from which the law raises the inference of negligence—R. C. 1855, p. 649, § 5. (See S. C. 34 Mo. 242; Brown v. Hann. & St. Jo. R.R. Co., 33 Mo. 309.)—Calvert v. Hann. & St. Jo. R.R. Co., 467.

CORPORATIONS, MUNICIPAL.

Revenue.—The levying of taxes is a matter solely of statutory creation, and no means can be resorted to, to coerce their payment, other than those pointed out in the statute. A tax, in its essential characteristics, is not a debt, nor in the nature of a debt, but is an impost levied by the government upon its citizens for the support of the State. A municipal corporation cannot provide for the collection of taxes by a suit against the tax-payer, unless the power be specifically delegated by its charter.—City of Carondelet to use, &c., v. Picot, 125.

See ELECTIONS. REVENUE.

COURTS.

See JURISDICTION. PRACTICE, CIVIL.

1. *Jurisdiction—Contempts.*—A court of record has authority to punish summarily contempts committed in its immediate presence, but in other cases the offender must be notified and have a reasonable time to make his defence.—Matter of Greene County v. Rose, 390.
2. *Jurisdiction.*—Where a court originally possesses and exercises its jurisdiction over a subject, its authority to proceed will not be divested or impaired by any legislative amendment of the law conferring jurisdiction, unless express prohibitory words are used.—State ex rel. Reniek v. St. Louis Co. Ct., 402.
3. *Guardian—Jurisdiction—Insane Persons.*—The statute R. C. 1865, p. 234, § 52, which took effect from its passage, gave to the County Court of any county jurisdiction to inquire whether any person in the county was so

COURTS (*Continued*).

addicted to habitual drunkenness as to be incapable of managing his affairs, and in such cases to appoint a guardian. The act of March 19, 1865, (Sess. Acts 1865-6, p. 244,) vesting the Probate Court of St. Louis county with such jurisdiction, did not take away the jurisdiction of the St. Louis County Court. The jurisdiction of the two courts is concurrent.—*Id.*

CRIMES.

1. *Homicide.*—The law of homicide may be regarded as definitely established in this State by a series of well considered and consistent decisions. Where the evidence all tends to prove a case of murder in the first degree, or of justifiable homicide, it is proper for the court, by its instructions, to confine the attention of the jury to the two points.—State v. Starr, 270.
2. *Murder.*—The right of self-defence, which justifies homicide, does not imply the right of attack, and the plea cannot avail in any case where the difficulty was induced by the act of the party accused in order to afford him a pretext for wreaking his malice.—*Id.*
3. *Murder — Manslaughter.* — To have the effect to reduce the guilt of killing from that of murder in the first degree to manslaughter, the provocation must consist of personal violence; neither words of reproach nor insulting gestures can have this effect.—*Id.*
4. *Robbery.*—To constitute the offence of robbery in the first degree, the property must be taken from or in the presence of the prosecutor, against his will, and by putting him in fear of some immediate injury to his person, &c. —State v. Davidson, 374.

See CRIMINAL PRACTICE.

D

DAMAGES.

1. *Assignment—Interest—Judgment.*—In a suit against the securities upon the official bond of an assignee, the judgment against the securities should only authorize the collection of the damages assessed, with the legal rate of interest (six per centum) thereon—R. C. 1855, p. 890, § 3. The rate of interest in such cases is not fixed by contract.—State to use, &c., v. Hart et als. 44.
2. *Trespass—Mortgage.*—When the mortgagee has been paid his debt, he cannot sue in trespass to recover damages for waste committed or done prior to the payment.—Kennerly et al. v. Burgess' Adm'r, 440.

See REVENUE. EJECTMENT, 10. MORTGAGES. INTEREST. INJUNCTION. EVIDENCE. LANDLORD AND TENANT.

DEDICATION.

See HIGHWAY. EQUITY.

DEPOSITIONS.

1. *Depositions in perpetuam—Notice.*—The statute R. C. 1825, p. 617, in relation to the perpetuation of testimony, required that the notice, when given by publication, should be published once a week for one month, at least two months previous to the day of taking the depositions. A deposition to perpetuate testimony, although recorded, which does not show such notice, can-

DEPOSITIONS (*Continued*).

not be read in evidence. In case of depositions taken *in perpetuam*, the forms of the law under which they are taken must be strictly pursued, or they cannot be read in evidence. Under the act R. C. 1825, p. 617, it must appear that "the questions and answers were reduced to writing, as near as possible, in the words of the witness," that the deposition was distinctly read over to said witness, and that the deposition was forwarded to the clerk of the Circuit Court within thirty days, for the purpose of being recorded.—Patterson v. Fagan et al., 70.

DIVORCE.

Practice — Error. — Writ of error upon a judgment granting a divorce dismissed, the writ not having issued within sixty days after judgment rendered. (R. C. 1855, p. 666, § 13.)—Judge v. Judge, 159.

DOMICIL.

Non-residence. — A man's residence, like his domicil, or usual place of abode, means his home, to and from which he goes and returns daily, weekly, or habitually, from his ordinary avocations and business, wherever carried on. The indefinite abode of a party in this State, and doing business herein, but without the intention of remaining here permanently, does not make him a resident of this State. Under the provisions of the Attachment Act, he is to be considered as a non-resident.—Greene et al. v. Beckwith, 384.

DRAM-SHOPS.

See CRIMINAL PRACTICE.

E

EJECTMENT.

1. *Practice — Parties.* — Where several plaintiffs sue in ejectment, and one is shown to have no title to the premises, the plaintiffs cannot jointly recover judgment; but, by dismissing the petition as to the plaintiff shown to have no title, the suit may proceed, and the remaining plaintiffs may recover.—Primm et als. v. Walker, 94.
2. *Tenants in common.*—Before one tenant in common can maintain ejectment against his co-tenants on an outstanding title for his own exclusive benefit, he must surrender the common possession (if he has any) to the others, or he must show that the other tenants in common are holding adversely to him.—Forder v. Davis, 107.
3. *Partition—Estoppel—Judgment.*—A judgment in partition establishes the title to the land which is the subject of partition, and in an action of ejectment upon an adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive upon all parties to the record, and upon all persons holding under them by title subsequent to the commencement of the suit.—*Id.*
4. *Partition—Tenants in common—Ouster.*—A disseizin, or an actual adverse possession, destroys the unity of possession among tenants in common, and takes away the right of partition, until the title is determined in an action of ejectment.—*Id.*
5. *Mortgage* — A mortgagee may maintain an action of ejectment against the mortgagor. An answer to a petition in ejectment by grantee against grantor

EJECTMENT (*Continued*).

in a deed absolute upon its face, claiming only that the deed was intended as a mortgage, not asking to reform the deed or to redeem the land, shows no defence in equity.—Sutton v. Mason, 120.

6. *Forcible Entry and Detainer.*—The proceedings and a judgment in a suit for forcible entry and detainer of premises are no bar to a suit in ejectment for the same premises.—Carter v. Scaggs et al., 302.

7. *Defence.*—In an action of ejectment, the issue to be tried is the plaintiff's right to the possession of the premises sued for, and upon the trial of the general issue the defendant may avail himself of a defence that the plaintiff had not the present right of possession.—*Id.*

8. *Equity—Judgment—Execution.*—A bill in equity is not the proper remedy to recover possession of lands. Where the judgment upon which execution issued, and the land was sold by the sheriff, is void, the sheriff's sale and deed will pass no title, and the defendant has an adequate remedy at law in ejectment against the purchaser at the sheriff's sale in possession. Where there is an adequate and complete remedy at law, a court of equity will not interpose, unless upon some matters coming under some peculiar head of concurrent equity jurisdiction.—Janney v. Spedden et al., 395.

9. *Title—Waste.*—To recover in ejectment, the plaintiff must show a legal interest and a right to the possession. The plaintiff can recover damages for waste committed only when he recovers in the ejectment.—Beal v. Harmon, 435.

10. *Rents and Profits—Improvements.*—In an action of ejectment, the value of the improvements upon the land, made by the defendant in good faith, may be deducted from the rents and profits.—Fenwick v. Gill, 510.

11. *Judgment—Estoppel.*—A judgment in an action of ejectment is not a bar to a subsequent action between the same parties.—Holmes v. City of Carondelet, 551.

See CIVIL PRACTICE. CONVEYANCES. LAND AND LAND TITLES. JUDGMENTS. ESTOPPEL.

ELECTIONS.

1. *Vacating Ordinance—Circuit Attorneys.*—The offices of circuit attorneys having been vacated by the ordinance of March 17, 1865, and having been filled in the manner therein provided, their term will not be required to be legally filled at the election in November, 1866. Holmes, J., dissenting.—Circuit Attorneys' Election, 419.

2. *Elections—Voters—Registration.*—A legally qualified voter, under the terms of the Constitution, must be registered as such in the election district in which he resides.—State ex rel. Garesché v. Bond, 425.

3. *Legal Voters.*—It is to be presumed, in the absence of any evidence to the contrary, that the voters voting at an election "held in pursuance of law and upon proper notice," are all the legal voters; or, that those who did not choose to vote (if there are any) acquiesce in the action of those who do vote, and are to be considered as bound and concluded by the result of the election. (Bassett v. Mayor, &c., 37 Mo. 270.)—State v. Binder, 450.

4. *Sunday—City of St. Louis—Crimes.*—The statute of Mar. 4, 1857, provided that the municipal corporations of St. Louis county, whenever authorized by a majority of the legal voters, might grant permission to sell within the

ELECTIONS (*Continued*).

corporate limits, on Sunday, any refreshments except distilled spirits. At an election, the majority of those voting voted in favor of giving the permission, and the city council of St. Louis passed an ordinance accordingly. *Held*, that the ordinance of the city thus passed operated so far as a repeal of the statute forbidding the sale of fermented liquors on Sunday (R. C. 1855, p. 631, § 36) within the limits of the city of St. Louis.—*Id.*

5. *Mandamus — Votes.*—After the clerk of the county court has, in pursuance of the statute, called to his assistance two justices of the peace or of the county court, and has publicly examined and cast up the vote of the county, nothing remains for him to do but the ministerial duty of issuing certificates to the candidates elected. The legality or illegality of the votes is not submitted to his judgment; the determination of that question belongs to other tribunals. Any party aggrieved by the issuing of the certificate must pursue his remedy in the courts.—State ex rel. Bell v. Harrison, 540.

EQUITY.

1. *Practice — Pleading.* — Although a plaintiff, upon a petition in equity, may not be entitled to the special relief prayed, yet, under the prayer for general relief, the court may give him the relief to which he shows himself entitled. A court of equity having once acquired jurisdiction, will proceed to do complete justice between the parties.—Holland v. Anderson et al., 55.
2. *Vendor and Vendee — Fraud.* — Fraudulent misrepresentation and concealment by a vendor of land, as to the nature, quality, quantity, situation, and title therof, affecting the whole subject matter of the contract, will entitle the vendee to relief; but such misrepresentation by the vendor must be in reference to some material thing unknown to the vendee, either from not having examined, or from want of opportunity to be informed, or from special confidence being reposed in the vendor.—*Id.*
3. *Trust—Note—Description of Payee.*—Where the payee holds a note or instrument in fiduciary capacity, and the purchaser or endorsee has notice of the fact, and also that the trustee is committing a breach of faith, the purchaser will not be protected.—Renshaw v. Wills, 201.
4. *Trust—Notice.*—Where a note executed by the purchaser at a partition sale to "J. S., sheriff," was secured by a deed of trust upon the property sold, if the deed of trust show the consideration of the note, and the endorsee of the sheriff purchasing the note received also the deed of trust which showed the consideration for the note, or knew of the deed when he purchased the note, he will be held to have notice of the fiduciary character of the sheriff, and will not be considered as a holder in good faith. The sheriff in taking the note is a trustee executing a trust devolved upon him by law.—*Id.*
5. *Notes.*—A party receiving notes after they are past due, is put upon inquiry, and will be considered as having taken them with full notice of all the infirmities or equities which attach to them. — Chappell v. Allen et als., 213.
6. *Resulting Trusts* —Where the purchase money of land is paid by one party and the legal title taken in the name of another, the parties being strangers, a resulting trust arises in favor of the party from whom the consideration proceeds. A similar rule prevails in cases where the consideration proceeds

EQUITY (*Continued*).

from two or more jointly, and the legal estate is taken in the name of one of them only.—Baumgartner v. Guessfeld et al., 36.

7. *Resulting Trusts—Evidence.*—The admissions of the party holding the legal title are admissible to prove by whom the consideration was paid.—*Id.*

8. *Judgment—Execution—Ejectment.*—A bill in equity is not the proper remedy to recover possession of lands. Where the judgment upon which execution issued, and the land was sold by the sheriff, is void, the sheriff's sale and deed will pass no title, and the defendant has an adequate remedy at law in ejectment against the purchaser at the sheriff's sale in possession. Where there is an adequate and complete remedy at law, a court of equity will not interpose, unless upon some matters coming under some peculiar head of concurrent equity jurisdiction.—Janney v. Spedden et al., 395.

9. *Judgment—Fraud.*—A court of equity has jurisdiction in a direct proceeding between the parties to the record to set aside and vacate a judgment obtained by collusion and fraud. A bill in equity to set aside and vacate a judgment alleging that the judgment had been obtained by collusion between the plaintiffs in the original suit and some of the defendants, by inducing other of the defendants to withdraw an answer jointly filed by all without the consent, knowledge and privity of their co-defendants, who had a good defence upon the merits, presents a proper case for relief in equity. Courts of record are vested with a large discretion in allowing parties to withdraw pleadings, and to dismiss their actions as to one or more of the opposite parties; but this discretion ought not to be exercised so as to produce injustice.—Harris et al. v. Terrell's Exec'r, 421.

ESTOPPEL.

1. *Partition—Judgment.*—A partition in judgment establishes the title to the land which is the subject of partition, and in an action of ejectment upon an adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive upon all parties to the record, and upon all persons holding under them by title subsequent to the commencement of the suit.—Forder v. Davis, 107.

2 *Dedication—Estop. in pais—Public Square—Injunction.*—The County of Randolph had, in the year 1831, received a conveyance of a tract of land for the purpose of laying out a county seat. Upon the land so conveyed the County Court laid out the town of Huntsville, and caused a plat of the town to be filed in the recorder's office, showing the streets and alleys, blocks and lots. Upon one block on the plat was marked "public lots," and the property thereon designated had been for many years used as a public square and the courthouse erected thereon. Subsequently the County Court ordered part of this property to be sold, which was done, and the purchasers commenced the erection of buildings. The owners of lots facing the square applied to enjoin the erection of such buildings. *Held*, 1. That the county, by making and filing the plat of the town and marking this property as "public lots," had dedicated the land to public uses, and that its acts as proprietor had the same effect as the acts of an individual—R. C. 1825, p. 762; 2. That the owners of lots facing the square who had purchased and improved their lots upon the faith of the dedication of the square to public uses, might bring their bill to enjoin the erection of buildings upon the

ESTOPPEL *(Continued)*.

square by individuals; and 3. That, apart from the dedication of the square to public uses by filing and recording the plat, the *user* of the lots by the county and the inhabitants of the town as public property constituted a dedication, and that by such acts parties were estopped from denying that the property was dedicated to public use.—Rutherford et al. v. Taylor et al., 315.

3. *Ejectment—Judgment.*—A judgment in an action of ejectment is not a bar to a subsequent action between the same parties.—Holmes v. City of Carondelet, 551.
4. *Attachment—Garnishee—Judgment.*—A judgment against garnishee in a suit suit by attachment, or under an execution, will not protect him against a subsequent recovery in favor of one who had previously to the garnishment taken an assignment of the debt from the defendant.—Weil et al. v. Tyler, Garn., 558.

EVIDENCE.

1. *Revenue—Special Tax.*—The special tax bill issued by the city engineer of the City of St. Louis under the provisions of the act of January 16, 1860, (Sess. Acts 1859-60, p. 382,) is *prima facie* evidence of the liability of the party named therein as liable to pay the tax. (City to use, &c., v. Coons, 37 Mo. 44.)—City of St. Louis to use, &c., v. Armstrong, 29.
2. *Revenue—Damages.*—In the absence of any proof upon the subject, it will be presumed that a special tax bill was delivered to the contractor on the day of its date.—*Id.*
3. *Admissions—Pleadings.*—The admissions in pleadings by failing to specifically deny statements in the petition or answer, are admissions only for the particular case, and cannot be used as independent evidence in a different action.—Boatman's Sav. Inst. v. Holland, 49.
4. *Hearsay.*—The affidavits of persons who are competent witnesses in a suit, are inadmissible as evidence.—Patterson v. Fagan et al., 70.
5. *Instrument—Alterations.*—An instrument appearing upon its face to have received material alterations, cannot be admitted in evidence until the alterations are explained.—*Id.*
6. *Lands—Concessions.*—A concession of a lot by the French or Spanish Governments, is of itself no evidence to prove a title by virtue of inhabitation, cultivation and possession prior to the 20th December, 1803.—*Id.*
7. *Res gestæ—Agent.*—The statements of an agent, made at the time and in relation to the business he is then transacting, form part of the *res gestæ*, and are admissible in evidence against his principal.—Beardslee et al. v. Steinmesch, 168.
8. *Variance—Records.*—Upon an issue, upon a plea of accord and satisfaction, alleging that the plaintiffs had accepted, in satisfaction of their demands, goods and property which they had seized by virtue of an attachment against the defendant, a mere variance in the names of the plaintiffs in the two suits is immaterial, there being no question of any matter determined in the particular suits.—*Id.*
9. *Counsel—Hearsay.*—An attorney consulting with counsel upon a case, may, in an action for a malicious attachment, testify what was the opinion given to the plaintiff in the attachment by such counsel.—Alexander v. Harrison et al., 258.

EVIDENCE *(Continued)*.

10. *Practice—Supreme Court.*—Where there is no evidence to support an issue, it is the duty of the court so to instruct the jury; and where the evidence does not support the verdict, the Supreme Court will reverse the judgment.—*Id.*
11. *Practice—Trial—Witness.*—When it is proposed to contradict a witness by proof of different statements made, the attention of the witness must be called to the time, place and person involved in the supposed contradiction. —State v. Starr, 270.
12. *Receipt.*—A receipt of an attorney is not admissible in evidence without proof of its execution.—Acock's Adm'r v. McBroom, 342.
13. *Criminal Practice—Character.*—In the prosecution of a party accused of crime, the State cannot be allowed to give evidence of the bad character of the accused, except to rebut evidence given by him as to his good character.—State v. Creson, 372.
14. *Criminal Practice—Larceny.*—Recent possession of stolen property is presumptive evidence that the party having such property is the thief.—*Id.*
15. *Declarations.*—The declarations of a party in possession of property are admissible in evidence as explanatory of the possession, but not to prove the contract by virtue of which the possession was acquired.—Darrett v. Donnelly, 492.
16. *Criminal Practice*—Upon the trial of a party accused, evidence to show that the defendant has committed other crimes than those charged in the indictment is not admissible; but if the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another, separate and distinct offence. —State v. Harrold, 496.

See MORTGAGES, 17. BILLS AND NOTES. PRACTICE, CIVIL. PRACTICE, CRIMINAL. WITNESSES.

EXECUTIONS.

1. *Judgment Liens—Priority.*—Where judgments have equal effect as liens upon the real estate of the judgment debtor, the creditor who first levies his execution upon the lands subject to the lien, thereby acquires a priority, and is entitled to be first paid out of the proceeds of the sale.—Bruce v. Vogel, 100.
2. *Judgment Liens.*—Where lands are sold under junior judgments, the title to the land passes subject to the liens of all prior judgments, and the money realized from a sale under a junior judgment cannot be applied to an execution issued upon an elder judgment.—*Id.*
3. *Judgments.*—The act of March 3, 1863 (Sess. Acts 1863, p. 20) did not authorize a party to sue out an execution upon a judgment which had been rendered for more than five years, without an order of court, made in compliance with the provisions of the statute. (R. C. 1855, p. 904, §§ 13, 14.)—Turner et al. v. Keller et al., 332.
4. *Equity—Judgment—Ejectment.*—A bill in equity is not the proper remedy to recover possession of lands. Where the judgment upon which execution issued, and the land was sold by the sheriff, is void, the sheriff's sale and deed will pass no title, and the defendant has an adequate remedy at law in ejectment against the purchaser at the sheriff's sale in possession. Where

EXECUTIONS (*Continued*).

there is an adequate and complete remedy at law, a court of equity will not interpose, unless upon some matters coming under some peculiar head of concurrent equity jurisdiction.—Janney v. Spedden et al., 395.

5. *Sheriff's Sale — Purchaser.*— The provisions of the statute relating to Executions, R. C. 1855, p. 747, secs. 49 & 50, were intended to provide a summary and speedy process for the collection of the amount due upon the execution and to protect the creditor against loss: if, therefore, land is sold the second time because the first purchaser refused to comply with his bid, and the proceeds of sale satisfy the execution, the sheriff cannot have judgment, upon motion, against the first purchaser.—Reed v. Shepperd, 463.

6. *Agent—Attorney—Authority.*—The attorney of record who recovers a judgment has authority to receive the money realized upon execution, and those dealing with him will not be affected by a revocation of his authority unless they have notice thereof.—Acock's Adm'r v. McBroom, 342.

F

FORCIBLE ENTRY AND DETAINER.

Ejectment.—The proceedings and a judgment in a suit forcible entry and detainer of premises are no bar to a suit in ejectment for the same premises. —Carter v. Scaggs et al., 302.

FRAUDS, STATUTE OF.

1. *Lands — Licence to work Mines — Landlord and Tenant.* — A parol licence, or mere verbal privilege, carries no interest in land, and is a mere authority or privilege to do some particular acts upon the land of another. But a licence to work mines confers not only a right to enter and occupy, but to commit waste and carry away part of the realty itself, and is therefore an interest in lands, tenements and hereditaments within the statute of frauds; and must, in order to give any permanent heritable interest in the realty itself, or any right to a continued and perpetual possession, be put in writing and signed by the parties, or be given by deed; otherwise it can have no other or greater effect, either at law or in equity, than to create an estate at will. A parol licence is essentially revocable at will, and may be terminated under the statute by giving notice to remove. The right to enter and dig for ores is an incorporeal hereditament, and can only be acquired by deed, or by an adverse enjoyment for a sufficient length of time to furnish a presumption of a grant; but in all cases, to raise a presumption of a grant, the possession must be adverse.—Desloge et als. v. Pearce et al., 588.

FRAUDULENT CONVEYANCES.

Possession by Vendor. — By the statute R. C. 1855, p. 805, § 10, the continuance in possession by the vendor of goods sold is conclusive evidence of fraud in the sale as to the creditor of the vendor and purchasers from him without notice, unless the vendee can prove that the sale was made in good faith for a valuable consideration, and without any intent to defraud creditors or subsequent purchasers. When the claimant offers evidence, the question of good faith and honest intent are to be submitted to the jury, and it is their exclusive province to decide whether the transaction is or is not fraudulent.—State to use, &c., v. Evans et als., 150.

G

GUARDIAN AND WARD.

See ADMINISTRATION. COURTS. JURISDICTION.

1. *Probate Courts—Jurisdiction.*—The County Court by the statute of 1845 had no jurisdiction to authorize a guardian to sell the real estate of his ward for his support, and a purchaser at such sale takes no title. The power to sell given by the statute is to procure and complete the education of the minor. R.C. 1845, p. 551.—Beal v. Harmon, 435.

2. *Conveyance.*—The guardian occupied a relation of trust towards his ward which precluded him from purchasing at his own sale, and the county clerk could not execute to the guardian a deed for the premises sold.—*Id.*

3. *Interest—Note.*—Where the guardian lends the money of his ward and takes a note therefor, the interest will be compounded annually until the ward comes of age, although no such contract be expressed in the note—R. C. 1855, p. 827, § 30. Fagg, Judge, dissenting.—Payne v. King, Garn., &c., 502.

H

HIGHWAY.

See ESTOPPEL, 2.

HUSBAND AND WIFE.

1. *Marriage Contract.*—Where a marriage contract is made between parties upon a sufficient consideration, reserving to the wife all her separate property as if she were a *feme sole*, the principles of the common law as to the rights of the parties are inapplicable.—Overall, Adm'r, v. Ellis et als., 209.

2. *Conveyance—Ejectment.*—A deed executed by husband and wife, conveying the wife's real estate, although defectively acknowledged so as not to to pass the fee of the wife, passes the husband's life estate, and is good to maintain or resist an action of ejectment.—Beal v. Harmon, 435.

I

INJUNCTION.

See ESTOPPEL, 2. PRACTICE, CIVIL.

1. *Damages—Legal Tender.*—In assessing the damages, upon the dissolution of an injunction restraining the sale upon a deed of trust given to secure the payment of a debt, the court cannot allow as damages the difference in value between United States treasury notes at the time of the granting and dissolution of the injunction, as estimated by the value of gold coin in the market. In payment of debts between individuals, treasury notes and gold coin are to be considered as of equal value as a legal tender.—Riddlesbarger et al. v. McDaniel et al., 138.

2. *Practice—Change of Venue.*—A suit to enjoin the enforcing of a judgment must be brought in the county in which the judgment was rendered; and then if the judge be disqualified, a change of venue may be as awarded in other cases.—State ex rel. Duncan v. Price, 382.

INSURANCE.

1. *Policy—Conditions—Application.*—The terms of a policy provided, that it should be void in case of any other insurance not mentioned or endorsed on the policy, or in case of any subsequent insurance without notice to the insurer and endorsed upon the policy, or the notice acknowledged in writing. Such stipulations were a condition precedent to any right of recovery upon the policy. Where the application stated that an insurance then on the property would expire at a certain date, and would not be renewed, and the insured subsequently renewed said insurance, having violated the conditions, he cannot recover upon the policy.—Deitz v. Mound City Mut. Fire & Life Ins. Co., 85.

2. *Agency — Owner.* — An agent may effect an insurance in his own name for the benefit of the owner without giving the name of the owner of the goods, but the words of the policy must sufficiently indicate such intention. The word "agent" attached to the name of the person assured, imports that he is acting for an undisclosed principal; and parol evidence is admissible in such case to show for whose benefit the insurance is effected.—Plahto v. Mer. & Manuf. Ins. Co. of St. L., 248.

3. *Open Policy—Application.*—The terms of an open policy declared that the subject insured should "be specified by application, and mutually agreed upon and written on the policy." The secretary of an insurance company, unless he has authority given him by the by-laws, has no authority to waive such endorsement on the policy. S. M. G., "agent," had an open policy with the above stipulation, and applied to the insurer for insurance upon goods for a voyage; the secretary of the insurance company made a memorandum upon his books of the application, but G. not having his policy with him, he was told by the secretary that he must bring his policy and have the proper entry made: the goods had been lost at the time of the application, and on the same day G. was notified by the secretary that the goods were not insured, and he subsequently refused to make the entry on the policy. *Held*, that, as the policy required the application to be endorsed upon the instrument, the insurance never attached to the goods, and that the owner could not recover.—*Id.*

INTEREST.

1. *Guardian and Ward—Note.*—Where the guardian lends the money of his ward and takes a note therefor, the interest will be compounded annually until the ward comes of age, although no such contract be expressed in the note. (R. C. 1855, p. 827, § 30.) Fagg, J., dissenting.—Payne v. King, Garn., &c., 502.

2. *Notes and Bills.*—Although by the terms of a note the interest be payable annually, yet the interest will not be compounded unless the note express upon its face that the interest is to bear interest—R. C. 1855, p. 891, § 5. When any instalment of interest is payable, an action lies for its recovery. —Stoner v. Evans et als., 461.

3. *Assignment—Judgment.*—In a suit against the securities upon the official bond of an assignee, the judgment against the securities should only authorize the collection of the damages assessed, with the legal rate of interest (six per

INTEREST (*Continued*).

centum) thereon—R. C. 1855, p. 890, § 3. The rate of interest in such cases is not fixed by contract.—State to use, &c., v. Hart et als., 44.

J

JUDGMENTS.

1. *Partition—Estoppel—Ejectment.*—A judgment in partition establishes the title to the land which is the subject of partition, and in an action of ejectment upon an adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive upon all parties to the record, and upon all persons holding under them by title subsequent to the commencement of the suit.—Forder v. Davis, 107.

2. *Forcible Entry and Detainer.*—The proceedings and a judgment in a suit for forcible entry and detainer of premises are no bar to a suit in ejectment for the same premises.—Carter v. Scaggs et al., 302.

3. *Equity—Ejectment—Execution.*—A bill in equity is not the proper remedy to recover possession of lands. Where the judgment upon which execution issued, and the land was sold by the sheriff, is void, the sheriff's sale and deed will pass no title, and the defendant has an adequate remedy at law in ejectment against the purchaser at the sheriff's sale in possession. Where there is an adequate and complete remedy at law, a court of equity will not interpose, unless upon some matters coming under some peculiar head of concurrent equity jurisdiction.—Janney v. Spedden et al., 395.

4. *Liens.*—All judgments entered upon the same day have equal effects as liens, and one is not entitled to priority over the other.—Bruce v. Vogel, 100.

5. *St. Louis County—Liens.*—All judgment abstracts received and entered upon the same day, by the clerk of the St. Louis Land Court, are equal in effect as liens, although one be numerically entered before another upon the abstract book—R. C. 1855, p. 1594, § 13.—*Id.*

6. *Executions—Liens—Priority.*—Where judgments have equal effect as liens upon the real estate of the judgment debtor, the creditor who first levies his execution upon the lands subject to the lien, thereby acquires a priority, and is entitled to be first paid out of the proceeds of the sale.—Bruce v. Vogel, 100.

7. *Execution—Liens.*—Where lands are sold under junior judgments, the title to the land passes subject to the liens of all prior judgments, and the money realized from a sale under a junior judgment cannot be applied to an execution issued upon an elder judgment.—*Id.*

8. *Executions.*—The act of March 3, 1863 (Sess. Acts 1863, p. 20) did not authorize a party to sue out an execution upon a judgment which had been rendered for more than five years, without an order of court, made in compliance with the provisions of the statute. (R. C. 1855, p. 904, §§ 13, 14.)—Turner et al. v. Keller et al., 332.

9. *Practice—Publication.*—The notice under an order of publication, issued in a suit by attachment, must state that the defendant's property has been attached—R. C. 1855, p. 246, § 23; and if this be omitted, the judgment rendered upon such notice will be void.—Durossett's Adm'r v. Hale, 346.

JUSTICES' COURTS.

1. *Judgments—Limitations.*—Judgments rendered in a justice's court are not barred by the statute of limitations. (R. C. 1855, p. 1053, § 16; Humphreys v. Lundy, 37 Mo. 320.)—Sublett v. Nelson, Adm'r, 487.
2. *Attachment—Evidence.*—When the garnishee in an attachment suit denies any indebtedness and the answer is not traversed by the plaintiff, the answer of the garnishee is to be taken as true. In cases of garnishment where the garnishee does not acknowledge an indebtedness, the attaching creditor must by his denial raise a triable issue if he seek to recover a judgment against the garnishee. The answer of the garnishee is evidence for himself, and must be rebutted by competent proof.—McCause et al. v. McClure, Garn., 410.

JURISDICTION.

See COURTS, 1, 2, 3.

1. *Prohibition.*—The Circuit Court may issue a writ of prohibition to forbid any judicial proceeding by an inferior court beyond its proper jurisdiction. Where the Circuit Court has jurisdiction of the subject matter, it has power to issue this writ to any inferior court.—Howard et al. v. Pierce, 296.
2. *Prohibition—Judgment.*—The proper method of enforcing a writ of prohibition if it be disobeyed, is by an attachment for contempt for disobedience to the order, and not by the issuing a writ of restitution or execution.—*Id.*
3. *Attachment—Practice—Process—Publication.*—A judgment *in personam* for a debt against a non-resident of this State, obtained upon a mere order of publication, without the service of any process, or of an attachment upon the defendant's property, is a judgment without process and void. A party summoned as garnishee by execution upon such judgment may defend by showing the invalidity of the judgment for want of jurisdiction. The statute R. C. 1855, p. 1224, § 13, was not intended to give such jurisdiction; it applied only to cases where the court had jurisdiction over property sought to be affected by the suit.—Smith v. McCutchen, Garn., 415.
4. *Attachment— Process.* — Judgments obtained on an attachment process against non-residents will bind the property attached, but will not be treated as evidence of indebtedness, or as operative in any manner *in personam*, for there is no power of adjudication. —*Id.*
5. *Probate and Common Pleas Court of Greene County.*—The Probate and Common Pleas Court of Greene county has concurrent jurisdiction with justices of the peace and Circuit Courts only in actions on contracts; it has no jurisdiction in actions on torts.—Franklin v. Vance et al., 476.

L

LANDLORD AND TENANT.

1. *Statute of Frauds.*—A tenancy at will, not witnessed by a writing, commences only from the day the tenant enters into possession.—Hardy v. Winter, 106.
2. *Rents.*—As a general rule, whenever the estate which the lessor had at the time of making the lease is divested or determined, the lease is extin-

LANDLORD AND TENANT *(Continued)*.

guished with it. If, therefore, a lot of land or premises under lease are required to be taken for city or other public improvements, the lease, upon confirmation of the report of the commissioners condemning the property, becomes void.—Barclay and wife v. Picker, 143.

3. *Practice—Default—Damages.*—In a suit upon a lease, after a judgment by default, the tenant may, to diminish the damages, show that the title of the lessor has been divested or defeated.—*Id.*

4. *Attachment—Affidavit.*—The object of the statute in authorizing the landlord to sue out an attachment, was to prevent the tenant from removing his property from the premises for any purpose or any pretext, if he thereby exposed the landlord to the danger of losing his rent. The affidavit should state affirmatively the facts relied on as grounds for the attachment. (R. C. 1855, p. 1015.)—Kleun v. Vinyard, 447.

5. *Practice—Tenant in common.*—No action for the use and occupation of lands can be brought, except where the relation of landlord and tenant exists. One tenant in common cannot sue his co-tenant for use and occupation, unless there be a tenancy by agreement.—Hutton v. Powers, 353.

6. *Municipal Corporations.*—Decision in case of Graham v. City of Carondelet, 33 Mo. 262, affirmed.—Holmes v. City of Carondelet, 551.

7. *Notice to Quit.*—To terminate a general tenancy at will, one month's notice to quit is sufficient. (R. C. 1855, p, 1012, § 13.)—Desloge et als. v. Pearce et al., 588.

LICENCE.

1. *Lands—Statute of Frauds—Landlord and Tenant.*—A parol licence, or mere verbal privilege, carries no interest in land, and is a mere authority or privilege to do some particular acts upon the land of another. But a licence to work mines confers not only a right to enter and occupy, but to commit waste and carry away part of the realty itself, and is therefore an interest in lands, tenements and hereditaments within the statute of frauds; and must, in order to give any permanent heritable interest in the realty itself, or any right to a continued and perpetual possession, be put in writing and signed by the parties, or be given by deed; otherwise it can have no other or greater effect, either at law or in equity, than to create an estate at will. A parol licence is essentially revocable at will, and may be terminated under the statute by giving notice to remove. The right to enter and dig for ores is an incorporeal hereditament, and can only be acquired by deed, or by an adverse enjoyment for a sufficient length of time to furnish a presumption of a grant; but in all cases, to raise a presumption of a grant, the possession must be adverse.—Desloge et als. v. Pearce et al., 588.

LIMITATIONS.

1. *Land—Adverse Possession.*—A., a minor feme covert, in 1842, joined with her husband in a conveyance to B. of land held by A. and B. with others, as tenants in common, for the purpose of concentrating the title, in order to eject an intruder. In 1846, B. and the other co-tenants made a parol partition of the land, disregarding the rights of A., and took possession of their several allotments. In 1847, A. and her husband made a deed to G.,

LIMITATIONS (*Continued*).

disaffirming the deed of 1842. The husband died in 1849. *Held*, that after the partition the possession by the co-tenants uniting therein became adverse to all the world, and that from the death of the husband of A. in 1849, the statute commenced to run against the grantee of A.—Gautier v. Howard et als., 68.

2. *Justices' Courts—Judgments.*—Judgments rendered in a justice's court are not barred by the statute of limitations. (R. C. 1855, p. 1053, § 16; Humphreys v. Lundy, 37 Mo. 320.)—Sublett v. Nelson, Adm'r, 487.

3. *Ejectment—Tenants in Common—.*—A party entering into possession of land under a deed which makes him a tenant in common with other parties, will be presumed to take possession for his co-tenants as well as for himself. Where an adverse possession for the time required by the statute is shown, there is no need of presuming a deed, as the adverse possession by itself alone will be evidence of an estate in fee and equivalent to an absolute title. —Warfield et als. v. Lindell et als., 561.

4. *Ejectment—Tenants in Common—Ouster—Land.*—By presumption of law, the possession of one tenant in common is the possession of his co-tenants; but where one co-tenant takes possession of the land, and openly and notoriously exercises acts of exclusive ownership for a series of years, as by removing the soil, quarrying and selling rock, and by such acts as amount to the destruction of the thing itself, taking all the rents and profits without account, and by other acts which exclude the idea of his claiming as co-tenant, a jury will be warranted in presuming an ouster. The notice of ouster to the co-tenants may be constructive, by such open and notorious acts of ouster, or such an assertion of a claim to the exclusive possession of the whole land, as in law will impart notice to the co-tenants of an adverse and exclusive claim of title.—*Id.*

LANDS AND LAND TITLES.

1. *Public Schools—Survey.*—The survey and setting apart to the use of schools, by the Surveyor General, of a lot reserved for the use of schools by the acts of Congress of June 13, 1812, January 27, 1831, and May 26, 1824, passed to the Schools the title of the United States. The acts of Congress and the survey are equivalent to a patent, and all previous steps required by law are to be presumed. No limitation as to the time of the survey was prescribed by the act of May 26th, 1824.—Patterson v. Fagan et al., 70.

2. *Concessions—Evidence.*—A concession of a lot by the French or Spanish Governments, is of itself no evidence to prove a title by virtue of inhabitation, cultivation and possession prior to the 20th December, 1803.—*Id.*

3. *Conveyance*—An instrument affecting lands, the execution of which is not proved in accordance with the statute, is not entitled to be recorded, and a certified copy of the record is not admissible in evidence.—Patterson v. Fagan et al., 70.

4. *Patent—Description.*—Although there may be repugnancy in the descriptive calls of the land granted by a patent, yet if enough of description remain to identify the location of the land, it will be sufficient.—Fenwick v. Gill, 510.

LANDS AND LAND TITLES (*Continued*).

5. *Confirmation—Grant.*—A grant may be made by law as well as by a patent pursuant to law; and a confirmation by law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*. When an act of Congress confirming lands also authorizes patents to issue, the production of the patent is not absolutely necessary for the purpose of showing a grant of title.—*Id.*
6. *Grants by United States—Fraud.*—Courts cannot inquire into the reasons and motives of Congress in passing an act confirming or granting lands to an individual.—*Id.*
7. *Pre-emptions—Register and Receiver.*—In some cases, where a party has acquired some actual and definite legal right to lands under acts of Congress, the grantee of land under a patent has been declared in equity to be a trustee for the use of another having the better legal right; but the party seeking the relief must bring himself within the provisions of the acts of Congress under which he claims his right. If lands be erroneously reserved from pre-emption or entry by order of the land officers of the government, the party desiring to make a pre-emption or entry may appeal to the Secretary or the President to set aside the reservation, so that he may be permitted to pre-empt or enter the land.—Fenwick v. Gill, 510.

See CONVEYANCES. EJECTMENT. LIMITATIONS. ATTACHMENTS.

M

MALICIOUS PROSECUTION.

1. *Probable Cause—Advice of Counsel.*—To enable a party sued for a malicious prosecution to protect himself, upon the ground that he acted under advice of counsel, he must show that he communicated to such counsel all the facts bearing upon the guilt or innocence of the accused which he knew, or by reasonable diligence could have ascertained; and he must not omit to state a fact known to him, although he honestly supposed it was not material.—Hill v. Palm, 13.
2. *Probable Cause.*—In a suit for malicious prosecution, it is not competent, in support of the defence of probable cause, to show that the defendant was guilty of another and different offence. Where the offence charged was larceny, it is not competent to show that the defendant severed from the freehold, and the buildings thereon, the materials thereof, and took and stole the same, unless the value of the articles stolen exceeded the sum of five dollars —R. C. 1855, p. 579, § 38.—*Id.*
3. *Action—Attachment.*—To sustain an action for maliciously suing out an attachment, it must be shown by satisfactory evidence that the plaintiff in the attachment knew that he had no cause of action whatever against the defendant, and that he also acted maliciously therein.—Alexander v. Harrison et als., 258.
4. *Action—Attachment—Error—Probable Cause.*—Where a client fairly submits all the facts of the case to his counsel in good faith, and is advised by them that he has a cause of action against the defendant in the attachment, and merely pursues the course recommended by them, relying upon the correctness of their legal opinion, he cannot be held liable in an action for

MALICIOUS PROSECUTION (*Continued*).

maliciously suing out an attachment. Malice cannot be imputed to him in such case, and it is error to instruct the jury in such manner that they may so find.—*Id.*

MECHANICS' LIENS.

1. *Practice — St. Louis County.*—By the mechanics' lien act relating to Saint Louis county (Sess. Acts 1857, p. 242, § 18), every sub-contractor, seeking to enforce a lien, is bound to serve a notice upon the owner ten days before filing his lien; and if no notice be given, the lien will be void. But if a sub-contractor filed his lien without giving notice, he could, within the time limited by the statute, give his notice and file his lien, and enforce the same. (See Mulloy v. Lawrence, 31 Mo. 583.)—Davis et al. v. Schuler et al., 24.
2. *Notice.*—The notice required to be given by § 18 of the "Act relating to mechanics' liens in St. Louis county" (Sess. Acts 1857, p. 668) must be in writing, signed by the party claiming the lien, or his agent, and must state who holds the claim and upon what account accrued, &c. These requisites of the statute cannot be supplied by parol evidence. The act is in derogation of the common law, and must be strictly complied with by every person who asserts a claim of right under it.—Schulenburg et als. v. Bascom et als., 188.

MERCHANTS.

See CRIMINAL PRACTICE.

MORTGAGES AND DEEDS OF TRUST.

1. *Ejectment.*—A mortgagee may maintain an action of ejectment against the mortgagor. An answer to a petition in ejectment by grantee against grantor in a deed absolute upon its face, claiming only that the deed was intended as a mortgage, not asking to reform the deed or to redeem the land, shows no defence in equity.—Sutton v. Mason, 120.
2. *Power — Sheriff's Sale.* — A. made to B., as trustee, a deed of trust of lands to secure the payment of a debt due by A. to C. The deed provided, that, in default of payment of the debt secured, B., or, in case of his death or absence from the State, the sheriff of the county, might sell the land in accordance with the terms prescribed. In default of payment, B. being absent from the State, the sheriff advertised and sold the land in accordance with the terms prescribed by the deed, and executed a deed to the purchaser; which, after reciting the deed of trust and the powers given, the advertisement, sale, and receipt of the consideration, contained the following granting clause: "I, J. C. V., sheriff and trustee as aforesaid, in consideration, &c., and by virtue of the authority in me vested by said deed and appointment, do hereby assign, transfer and convey to him (the purchaser) all the right, title and interest in me vested by said deed and appointment, that I may or can sell and convey as sheriff and trustee as aforesaid, by virtue of said deed, appointment and advertisement, of, in and to the said real estate, &c. *Held*, that the sheriff took a power under the deed, that in the cases provided by the deed he could execute said power and thereby divest the grantee of his estate, and convey the same to the purchaser; that he held the power for the benefit of the holder of the notes; that the power was not revocable by the grantors in the deed of trust, the debt remaining unpaid;

MORTGAGES AND DEEDS OF TRUST (*Continued*).

that the deed delivered by the sheriff properly executed the power, and the purchaser thereby acquired an estate in fee. (Miller et al. v. Evans et al., 35 Mo. 45, P. 1, disapproved.)—McKnight v. Wimer, 132.

3. *Vendors and Purchasers—Trustees—Covenants.*—A trustee undertakes only to convey the title vested in him by the deed giving him the power, and cannot be required to enter into any personal covenants against encumbrances in general. The only covenants which can be required of a trustee executing a mere naked power, is the usual trustee covenant against acts and encumbrances done or suffered by himself.—Barnard v. Duncan, 170.

4. *Vendors and Purchasers.* — The purchaser, at a sale made by a mortgagee or trustee selling under a power to sell for the payment of debts, must take notice of the title and its defects as it appears of record.—*Id.*

5. *Sale—Damages.*—Where the trustee, in a deed of trust with a power of sale at public auction upon giving notice for a certain number of days, advertises the property and puts it up for sale, and the property is struck off to a bidder, the trustee cannot upon the same day re-sell the property because the purchaser refuses to complete his contract; there must be a new publication of notice. The difference in price between the two sales in such a case is not the proper measure of damages.—*Id.*

6. *Vendors and Purchasers—Notice of defects of Title—Trustees—Fraud.*—At a sale by a trustee under a power where the facts or means of information concerning the condition and value of the thing sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other or to mislead him, there is no fraud of which the law can take notice; but where material facts are accessible to the vendor only, and he knows them not to be within the diligent attention, observation and judgment of the other party, he is bound to disclose those facts and make them known to the purchaser. The vendor must disclose all material facts of which he knows the vendee to be ignorant. There may be fraud in the suppressing and concealing of material facts, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion.—*Id.*

7. *Debt.*—Where notes are given secured by a deed of trust or mortgage, the assignment of any of the notes is an equitable assignment of the security in the same proportion.—Chappell v. Allen et als., 213.

8. *Entry of Satisfaction.* — The entry of satisfaction of the debt made upon the margin of the record of a mortgage or deed of trust, in pursuance of the provisions of the statute, is in law evidence to show that the note or debt, upon which the mortgage or deed of trust is founded, has been paid; and the acknowledgment must be rebutted by evidence.—*Id.*

9. *Instalments.*—Upon the foreclosure of a mortgage securing notes maturing at different dates, the notes are to paid from the proceeds of sale in the order in which the notes mature—Mitchell v. Ladew, 36 Mo. 526, P. 1, reviewed and affirmed.—Thompson v. Field et al., 320.

10. *Practice—Parties.*—An absolute deed of lands and a defeasance executed at the same time constitute a mortgage; and in a bill to redeem, the administrator of the mortgagee is the only necessary party.—Copeland v. Yoakum's Adm'r et als., 349.

MORTGAGES AND DEEDS OF TRUST (*Continued*).

11. *Trespass—Damages.*—When the mortgagee has been paid his debt, he can not sue in trespass to recover damages for waste committed or done prior to the payment.—Kennerly et al. v. Burgess' Adm'r, 440.
12. *Payment — Legal Tender.* — United States notes are a legal tender in payment of debts contracted before the passage of the act of Congress; and if a mortgagee refuse to accept such payment when tendered, he may be compelled to accept payment and enter satisfaction of the mortgage. (See *ante* Appel v. Woltmann et al. 194.)—Verges v. Giboney, 458.
13. *Auction—Specific Performance.*—Where property offered for sale at auction by a trustee in a deed of trust is knocked down to the highest bidder, the sale may be enforced in equity in a suit for a specific performance, or the bidder may be held liable at law for the damages sustained.—Dover v. Kennerly et al., 469.
14. *Auction — Trustee's Sale.* —When the purchaser to whom the property is struck off at a trustee's sale at auction fails to complete his purchase, the property must be re-advertised for sale—Barnard v. Duncan, *ante*, 170.—*Id.*
15. *Pleading—Injunction.*—A party seeking to enjoin a sale under a mortgage or deed of trust, must set forth specifically the defence relied upon, such as payment, want of consideration, &c.; it is not sufficient to allege that he does not owe the note described in the mortgage.—Foster v. Reynolds, 553.
16. *Future Advances.* — A mortgage may be given to secure future advances, or as a general security for balances which may become due; and the security may be taken in a sum large enough to cover the floating debt to be secured thereby.—*Id.*
17. *Parol Evidence.*—Parol evidence is admissible to show with what purpose and intent a mortgage was executed; as, that, although upon its face it was given to secure a specific sum, it was intended as a security for future advances and responsibilities.—*Id.*

See EQUITY.

N

NUISANCE.

See ESTOPPEL.

O

OFFICERS.

1. *Education—Constitution.*—By the terms of Constitution, art. 5, § 8, all officers appointed by the Governor to fill a vacancy, unless otherwise provided by law, were to hold their offices until their successors were duly elected, or appointed, and qualified. By virtue of this provision, the Superintendent of Public Instruction was continued in office until his successor was appointed or elected, and qualified.—State ex rel. Robinson v. Auditor, 192.
2. *Vacating Ordinance — Circuit Attorneys.* — The offices of Circuit Attorneys having been vacated by the ordinance of March 17, 1865, and having been filled in the manner therein provided, their term will not be required to be legally filled at the election in November, 1866. Holmes, J., dissenting.—Circuit Attorneys' Election, 419.
3. *Authority.*—The acts of an officer *de facto*, although his title may be bad, are valid so far as they concern the public, or the rights of third persons

OFFICERS (*Continued*).

who have an interest in the things done. Official acts cannot be impeached collaterally.—Harbaugh v. Winsor et al., 327.

4. *Courts.*—A writ of summons issed by a person claiming the office and performing the duties of a clerk of a court, is a valid writ. The want of title in the clerk *de facto* is no cause for quashing the writ.—*Id.*

P

PARTITION.

1. *Estoppel—Judgment.*—A judgment in partition establishes the title to the land which is the subject of partition, and in an action of ejectment upon an adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive upon all parties to the record, and upon all persons holding under them by title subsequent to the commencement of the suit.—Forder v. Davis, 107.
2. *Tenants in common—Ouster.*—A disseizin, or an actual adverse possession, destroys the unity of possession among tenants in common, and takes away the right of partition, until the title is determined in an action of ejectment.—*Id.*

PARTNERSHIP.

1. *Set-off—Practice.*—The debt due to a partnership cannot be set off against a debt due by an individual partner; but if the goods furnished by the partnership be charged to the individual partner, and are by him furnished to the plaintiff, the debt may be set off against plaintiff's demand.—Lamb v. Brolaski, 51.
2. *Dissolution.*—After the dissolution of a partnership, one partner may endorse the notes and bills of the firm in liquidation to settle up the partnership business; but he cannot, without the consent of his co-partners, make such endorsement to pay a private debt of his own, or in the transaction of business wholly unconnected with the partnership affairs.—Chappell v. Allen et als., 213.

PAYMENT.

1. *Injunction—Damages—Legal Tender.*—In assessing the damages upon the dissolution of an injunction restraining the sale upon a deed of trust given to secure the payment of a debt, the court cannot allow as damages the difference in value between United States treasury notes at the time of the granting and dissolution of the injunction, as estimated by the value of gold coin in the market. In payment of debts between individuals, treasury notes and gold coin are to be considered as of equal value as a legal tender.—Riddlesbarger et al. v. McDaniel et al., 138.
2. *Legal Tender—Mortgage.*—United States notes are a legal tender in payment of debts contracted before the passage of the act of Congress; and if a mortgagee refuse to accept such payment when tendered, he may be compelled to accept payment and enter satisfaction of the mortgage. (See *ante* Appel v. Woltmann et al., 194.)—Verges v. Giboney, 458.
3. *Tender—United States Treasury Notes.*—A tender of payment made in U. S. treasury notes, declared by act of Congress to be a legal tender in payment of debts between individuals, is a good tender, although the contract to pay

PAYMENT (*Continued*).

stipulate that the debt "shall be paid in the current gold coin of the United States in full tale or count, without regard to any legal tender that may be established or declared by any law of Congress." As a legal medium of payment, there is no distinction between U. S. treasury notes made a legal tender and the gold coin of the United States. (See *ante* Riddlesbarger et al. v. McDaniel et al., 138; Henderson v. McPike, 35 Mo. 255.)—Appel v. Woltmann et al., 194.

POWERS.

See EQUITY. MORTGAGES AND DEEDS OF TRUST. PRINCIPAL AND AGENT. VENDORS AND PURCHASERS.

PRACTICE, CIVIL.

PROCESS AND PARTIES.

1. *Service of Process on Infants.*—Process may be served upon infants in the same manner as upon adults.—Baumgartner v. Guessfeld et al., 36.
2. *Parties—Assignees.*—The plaintiff in a suit who has assigned the judgment recovered to a third party, has no authority to collect or sue for the money realized upon the execution. The act (Sess. Acts of 1863, p. 15) does not confer such authority.—Acock's Adm'r v. McBroom, 342.
3. *Infants—Attorney.*—Infants cannot appear to a suit by attorney; they must appear by guardian or next friend.—Copeland v. Yoakum's Adm'r et als., 349.
4. *Process.*—A writ of summons not running in the name of the State of Missouri is voidable only, and not void; and advantage may be taken of the defect by motion; but after a judgment by confession, *nil dicit*, or by default, the defect is cured by the statute. (R. C. 1855, p. 1255, § 19.)—Doan et al. v. Boley et al., 449.

See ATTACHMENTS, 8, 9, 10, 11.

PLEADINGS.

5. *Evidence—Admissions.*—The admissions in pleadings by failing to specifically deny statements in the petition or answer, are admissions only for the particular case, and cannot be used as independent evidence in a different action.—Boatman's Sav. Inst. v. Holland, 49.
6. *Equity—Jurisdiction.*—Although a plaintiff, upon a petition in equity, may not be entitled to the special relief prayed, yet, under the prayer for general relief, the court may give him the relief to which he shows himself entitled. A court of equity having once acquired jurisdiction, will proceed to do complete justice between the parties.—Holland v. Anderson et al., 55.
7. *Note—Filing Instrument.*—A petition upon a note not filed with the petition, nor alleged to be lost or destroyed, but giving as an excuse for not filing the note that it is held by a third party, is defective upon demurrer.—Dyer's Adm'r v. Murdoch et al., 224.
8. *Answer.*—A motion to strike out matter set up in the answer, for the reason that it presents no legal defence to the cause of action, is proper practice.—Phillips v. Evans et al., 305.
9. *Petition—Partners.*—The Practice Act was never designed to dispense with the statement of a legal cause of action against the defendants. In

PRACTICE, CIVIL—PLEADINGS (*Continued*).

a suit against partners, the petition must aver that the defendants are partners.—Jones v. Tuller, 363.

10. *Publication—Petition—Judgment.*—Where the defendant, a non-resident, is brought into court by an order of publication, and does not appear, the plaintiff cannot have any other or different relief than that prayed in his petition. If after publication the plaintiff amend his petition and take a different judgment from that originally prayed, the judgment will be null and void—R. C. 1855, p. 1280, § 12. After service of notice by publication, the defendant cannot be held to have any notice of amendments to the petition.—Janney v. Spedden et al., 395.

11. *Answer.*—An answer filed, by the tenant in possession of land, to a petition in ejectment, traversing all the allegations of the petition, cannot be stricken out upon motion, although a separate answer and counter-claim filed by the landlord may show no legal defence to the action. The defendant has the right to retain possession until a better title be shown.—Jones v. Jackson et als., 444.

12. *Petition — Error.* — The plaintiff's right to sue upon the cause of action stated in the petition must be set forth by averments so as to tender an issue. A petition without such an averment is fatally defective, and no judgment can be rendered upon it. The description of the parties in the entitling of the petition is but a description of the persons, and forms no part of the statement required in the petition.—State to use, &c., v. Matson et als., 489.

13. *Answer.*—An answer may set up several defences, but they must be consistent with each other, and separately stated. An answer to a petition alleging a contract of sale, delivery and acceptance of the thing sold, cannot traverse the sale, delivery and acceptance, and at the same time admit the sale and plead in avoidance.—Darrett v. Donnelly, 492.

14. *Petition.* — In determining the sufficiency of a petition, the averments therein can alone be considered; exhibits filed constitute no part of the petition. A petition which does not show a cause of action by its averments, without reference to exhibits filed, is bad upon demurrer or on motion in arrest—Baker v. Berry, 37 Mo. 306; Curry v. Lackey, 35 Mo. 392. The forms attached to the statute, R. C. 1855, have not the sanction of legislative enactment.—Bowling v. McFarland, 465.

15. *Action for Delivery of Personal Property.*—In an action for the delivery of personal property, where the defendant pleads only that he did not take the property, the plaintiff's title is admitted; but it is incumbent on him to prove that the defendant had the goods. Where the plaintiff's title is also denied, he must further show a general or special property in the goods, and the right of an immediate and exclusive possession.—Gray v. Parker et als., 160.

16. *Mortgage—Injunction.*—A party seeking to enjoin a sale under a mortgage or deed of trust, must set forth specifically the defence relied upon, such as payment, want of consideration, &c.; it is not sufficient to allege that he does not owe the note described in the mortgage.—Foster v. Reynolds, 553.

TRIALS AND THEIR INCIDENTS.

17. *New Trial—Exceptions.*—Where a motion for a new trial filed in a cause

PRACTICE, CIVIL—TRIALS AND THEIR INCIDENTS (*Continued*).

is continued by the court, the bill of exceptions may be made out and signed during the term at which the motion is determined.—Riddlesbarger et al. v. McDaniel et al., 138.

18. *New Trial—Exceptions.*—Where the hearing of a motion for a new trial is continued by the court, the bill of exceptions may be signed at the term at which the motion is determined. (See *ante* Riddlesbarger et al. v. McDaniel et al., p. 138, P. 1.)—Gray v. Parker et als., 160.

19. *Instructions.*—Instructions should be predicated on the whole testimony, and when they have a tendency to restrict the consideration of the jury to isolated facts, to the exclusion of other facts which are before them in evidence, it is not only a misdirection but an infringement on the province of the triers of the facts.—Chappell v. Allen et als., 213.

20. *Bill of Exceptions—Supreme Court.*—The evidence presented at the trial must be set forth in the bill of exceptions, or its substance stated, so that the Supreme Court can judge of its legal effect. It is not proper for parties to agree that records and other documents may be referred to and read in the Supreme Court.—Lamb v. Brolaski, 51.

JUDGMENTS AND NEW TRIALS.

21. *Default—Damages.*—In a suit upon a lease, after a judgment by default, the tenant may, to diminish the damages, show that that the title of the lessor has been divested or defeated.—Barclay and wife v. Pickles, 143.

22. *Garnishment—Default.*—The denial to the answer of the garnishee was not filed within the time prescribed by the rule of court, but was afterwards filed, and a judgment by default taken against the garnishee; to set aside which judgment, a motion was made, supported by affidavits, of a good defence upon the merits, and that the garnishee had no notice of the filing of the denial out of time, which motion was overruled. The Supreme Court reversed the judgment and remanded the case, with leave for the garnishee to file his reply.—O'Fallon v. Davis, Garn., 269.

SUPREME COURT.

23. *Bill of Exceptions*—The Supreme Court will review the decisions of inferior courts upon motions, although the point of law be not specifically stated in the bill of exceptions, nor a motion for a new trial made.—Bruce v. Vogel, 100.

24. *Divorce—Error.*—Writ of error upon a judgment granting a divorce dismissed, the writ not having issued within sixty days after judgment rendered. (R. C. 1855, p. 666, § 13.)—Judge v. Judge, 159.

25. *Effect of Decision.*—Where a case has been decided by the Supreme Court, and is again taken up by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision. Whatever was passed upon will be deemed *res adjudicata*, and no longer open to dispute. (See S. C. 32 Mo. 322.)—Overall, Adm'r, v. Ellis et als., 209.

26. *Evidence.*—Where there is no evidence to support an issue, it is the duty of the court so to instruct the jury; and where the evidence does not support the verdict, the Supreme Court will reverse the judgment.—Alexander v. Harrison et al., 258.

PRACTICE, CIVIL—SUPREME COURT (*Continued*).

27. *Failure to file Transcript.*—Judgment affirmed for failure to file a transcript and prosecute appeal.—Kehoe v. Manning et al., 294.
28. *Final Judgment.*—Appeal dismissed for want of final judgment in the lower court.—Jones v. Robertson et al., 294.
29. *Writ of Error.*—Writ of error dismissed for failure of plaintiff in error to file a statement and brief.—Lansing v. Lansing, 295.
30. *Record — Petition.* — The record not containing a copy of the petition and answer, and being so defective that the court cannot determine whether there be error or no, judgment affirmed.—Eads v. Vollmer, 357.
31. *Record—Errors.*—The Supreme Court will judicially notice errors apparent on the face of the record.—Jones v. Tuller, 363.
32. *Record—Appeal.*—Stricken from the docket, the record not showing that any appeal had been taken, and no errors being assigned.—State v. O'Neal, 418.
33. *Error.*—For error apparent upon the face of the record, the judgment will be reversed.—State to use, &c., v. Matson et als., 489.

PRACTICE, CRIMINAL.

1. *Evidence—Character.* — In the prosecution of a party accused of crime, the State cannot be allowed to give evidence of the bad character of the accused, except to rebut evidence given by him as to his good character.—State v. Creson, 372.
2. *Larceny — Evidence.* — Recent possession of stolen property is presumptive evidence that the party having such property is the thief.—*Id.*
3. *Evidence.*—Upon the trial of a party accused, evidence to show that the defendant has committed other crimes than those charged in the indictment is not admissible; but if the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another, separate and distinct offence. — State v. Harrold, 496.
4. *Indictment—Dram-shops.*—An indictment charging a defendant with unlawfully "selling intoxicating liquors in less quantity than one gallon, to-wit, one glass of whiskey, without having a dram-shop keeper's licence, or any other legal authority to sell the same," is sufficient. It is not necessary that the indictment should state the name of any person to whom the liquor was sold. A sale implies a purchaser.—State v. Fanning, 359.
5. *Motion to quash — Supreme Court.* — The Supreme Court will not reverse a judgment in a criminal case because the court below refused to quash the indictment.—State v. Fanning, 362.
6. *Indictment—Adulterating Liquors.*—In an indictment under the act to prevent the adulteration of spirituous liquors, (Acts 1860–1, p. 93, § 4,) it is sufficient to allege that the defendant sold spirituous liquors without taking and subscribing the oath, and giving bond, as prescribed by the statute. The act applies to all persons selling spirits, irrespective of the quantity sold—State v. Crowley, 37 Mo. 369.—State v. Hays et al., 367.
7. *Indictment — Adulteration of Liquors.*—In an indictment under the act to prevent the adulteration of liquors, (Acts 1860–1, p. 93, § 4,) it is sufficient if the defendant be charged with selling spirituous liquors, without having

PRACTICE, CRIMINAL *(Continued)*.

taken and subscribed the oath and giving bond, as prescribed by the statute. It is unnecessary to state the kind of liquor sold, or the quantity, or the person to whom sold. (State v. Crowley, 37 Mo. 369; State v. Hays et al., *ante* 367.)—State v. Melton, 368.

8. *Indictment—Robbery.*—An indictment charging that defendant did feloniously rob, steal, take, seize and carry away from the presence and possession of A., by putting him (A.) in fear of some immediate injury to his person, is sufficient without alleging the time the act was done. (R. C. 1855, p. 574, § 20.)—State v. Wilcoxen, 370.

9. *Indictment—Jeofails.*—In any case where the time is not of the essence of the offence, the indictment will be good although the time of committing the offence be not stated. (R. C. 1855, p. 1176, § 27.)—*Id.*

10. *Indictment—Robbery.*—An indictment charging that "the defendant feloniously did steal, take and carry away, &c., of the property of A., &c., which property defendant took and carried away, in the presence of A., and against his will, by putting him in fear of some great bodily harm," will be held sufficient.—State v. Davidson, 374.

11. *Robbery.*—Under an indictment charging the offence of robbery in the first degree, the defendant may be convicted of larceny, but not of robbery in the second or third degree—State v. Jenkins, 36 Mo. 372.—*Id.*

12. *Indictment—Merchant.*—An indictment charging that the defendant did unlawfully deal as a merchant at a certain store, and did then and there sell divers goods, &c.—to-wit, one coat—to J. S., for the sum of, &c., without having any merchant's licence, or any legal authority therefor, is sufficient. The offence consists in the dealing as a merchant without a licence—State v. Willis, 37 Mo. 192.—State v. Jacobs, 379.

13. *Larceny—U. S. Treasury Notes*—When it is proved that United States Treasury notes of a particular denomination have been stolen, no evidence as to their value is necessary. The courts take judicial notice of the acts of Congress which define the nature and value of such notes. By our statute, R. C. 1855, p. 577, the money due upon any security is *prima facie* evidence of its value.—State v. Moseley, 380.

14. *Indictment—Dram-shop.*—An indictment for selling intoxicating liquors without having a dram-shop licence, must charge that the defendant sold the liquor in less quantity than one gallon. It is not sufficient to allege that he sold one pint. The gist of the offence is the selling a smaller quantity than one gallon.—State v. Rob. Fanning, 409.

15. *Robbery—Indictment.*—There cannot be a conviction for robbery in the second degree where the indictment charges a robbery in the first degree. (State v. Jenkins, 36 Mo. 372, affirmed.)—State v. Farrar, 457.

16. *Final Judgment.*—Appeal dismissed for want of final judgment upon demurrer.—State v. Gregory, 501.

17. *Instructions—Supreme Court.*—The Supreme Court will not reverse a judgment upon the ground of error in refusing instructions asked, where the instructions given by the inferior court fairly present the law of the case to the jury.—State v. Harrold, 496.

18. *Trial—Habeas Corpus.*—The application to be discharged, by a prisoner held under an indictment for a criminal offence, because he has not been

PRACTICE, CRIMINAL (*Continued*).

tried in accordance with R. C. 1865, ch. 213, §§ 27-28, must be made to the court in which the indictment is pending. No person can be discharged from an imprisonment under the *habeas corpus* act, who is imprisoned on an indictment, or by virtue of process to enforce such indictment—R. C. 1865, ch. 155, § 38.—*In re* Spradlend, 547.

19. *Evidence.*—Upon the trial of a party indicted, evidence tending directly to prove the particular crime charged is to be received, although it may also tend to prove the commission of another separate and distinct offence (See State v. Harrold, *ante*, 496.)—State v. Braunschweig, 587.

P

PRINCIPAL AND AGENT.

1. *Bailment — Bond — Bank—Negligence.*—A bank receiving promissory notes from its depositors for collection, is responsible for the negligence of a notary appointed by it for a year, and from whom it required a bond for the faithful discharge of his duties, in failing to give notice to an endorser of a negotiable promissory note of a demand upon and refusal of payment by the maker, by which the endorser was discharged. The notary is not, in such a case, an independent officer, in the discharge of a duty devolved upon him by law, but is the agent of the bank.—Gerhardt v. Boatman's Sav. Inst., 60.

2. *Power — Evidence.*—Where an express authority is given in writing by the principal to the agent, another or different authority cannot be implied. The extent of the authority is to be ascertained from the instrument itself, and it cannot be enlarged by parol evidence.—Mechanics' Bk. v. Schaumburg et al., 228.

3. *Power.*—A power of attorney given by a principal to his agent, to execute, sign, draw and endorse notes and bills in the business of the principal, will not import an implied authority to use the name of the principal in joint transactions with other persons and for their benefit.—*Id.*

4. *Notice—Evidence.*—The knowledge acquired by the officers of a corporation while in the discharge of their official duties, is the knowledge of the corporation itself.—Mechanics' Bk. v. Schaumburg et al., 228.

5. *Power—Corporation—Notice.*—A. gave W. a power of attorney, in her name, to borrow money, draw, sign and endorse bills and notes, and to execute deeds, &c. B. also gave W. a similar power. W., who was president of the bank, and kept an account with it in his own name, presented these powers to the bank as his authority to sign the names of A. and B. to joint notes, the proceeds of which notes went to W., of which the bank had notice. *Held*, that as the officers of the bank had, by the powers of attorney, notice of the extent of W.'s authority, the notes were not given in pursuance of the authority, and that the bank had notice of the want of power.—*Id.*

6. *Contract.*—A person who assumes to contract as agent, must see to it that his principal is legally bound by his act; for if he does not give a right of

PRINCIPAL AND AGENT (*Continued*).

action against his principal, he will be himself personally responsible.—Lapsley v. McKinstry, 245.

7. *Insurance.*—An agent may effect an insurance in his own name for the benefit of the owner without giving the name of the owner of the goods, but the words of the policy must sufficiently indicate such intention. The word "agent" attached to the name of the person assured, imports that he is acting for an undisclosed principal; and parol evidence is admissible in such case to show for whose benefit the insurance was effected.—Plahto v. Merch. & Manuf. Ins. Co., 248.

8. *Factor.*—If the factor, in consequence of a deception practised upon him by his principal, innocently incurs a risk or responsibility, and is compelled to pay damages to a purchaser on account thereof, he will be entitled to remuneration from his principal.—Yeatman et als. v. Corder et al., 337.

9. *Collection—Notice.*—It is the duty of an agent in all cases where he has collected money for his principal, to give him immediate notice of the fact.—McMahan v. Franklin et als., 548.

PROPERTY.

1. *Title—Accession—Identity.*—The law makes a distinction in acquiring title to property by accession, between a wilful and an involuntary wrongdoer. As the law does not permit any man to take advantage of his own wrong, the former can never acquire any title, however great the change wrought in the original article may be, while the latter may. But the doctrine of confusion and accession of goods does not apply to a case for the recovery of specific chattels, the identity of which must be shown before they are liable to seizure. If they cannot be identified, an action must be brought for their conversion.—Gray v. Parker et als., 160.

PROHIBITION.

1. *Jurisdiction.*—The Circuit Court may issue a writ of prohibition to forbid any judicial proceeding by an inferior court beyond its proper jurisdiction. Where the Circuit Court has jurisdiction of the subject matter, it has power to issue this writ to any inferior court.—Howard et als. v. Pierce et als., 296.

2. *Judgment.*—The proper method of enforcing a writ of prohibition if it be disobeyed, is by an attachment for contempt for disobedience to the order, and not by the issuing a writ of restitution or execution.—*Id.*

Q

QUO WARRANTO.

1. *Practice.*—State ex rel. McIlhany v. Stewart, 32 Mo. 379, affirmed. Otherwise than upon an agreed case upon the facts, the Supreme Court will exercise its discretion and refuse leave to file an information in the nature of a *quo warranto.*—State ex rel. Hequembourg v. Lawrence, 535.

QUO WARRANTO (*Continued*).

2. *Information.*—An information of *quo warranto* was originally a proceeding of a criminal nature prosecuted by the Attorney General, *ex officio*, in behalf of the State, to inquire into and punish the party usurping an office to which he had no legal title. An information in the nature of a *quo warranto* is essentially a civil proceeding to decide, as between two parties, which has the better right to an office, and can be filed in the Supreme Court only after leave granted.—*Id.*

R

REVENUE.

1. *Evidence—Special Tax.*—The special tax bill issued by the city engineer of the City of St. Louis under the provisions of the act of January 16, 1860, (Sess. Acts 1859-60, p. 382,) is *prima facie* evidence of the liability of the party named therein as liable to pay the tax. (City to use, &c., v. Coons, 37 Mo. 44:)—City of St. Louis to use, &c., v. Armstrong, 29.

2. *Evidence—Damages.*—In the absence of any proof upon the subject, it will be presumed that a special tax bill was delivered to the contractor on the day of its date.—*Id.*

3. *Municipal Corporations.*—The levying of taxes is a matter solely of statutory creation, and no means can be resorted to, to coerce their payment, other than those pointed out in the statute. A tax, in its essential characteristics, is not a debt, nor in the nature of a debt, but is an impost levied by the government upon its citizens for the support of the State. A municipal corporation cannot provide for the collection of taxes by a suit against the tax-payer, unless the power be specifically delegated by its charter.—City of Carondelet to use, &c., v. Picot, 125.

4. *Lien—Special Tax.*—The cases of City of St. Louis to use McGrath v. Clemens, 36 Mo. 467, and City of St. Louis to use Creamer v. Oeters, 36 Mo. 456, affirmed.—City of St. Louis, to use, &c., v. Armstrong, 167.

5. *Special Tax—Interest.*—By the act of Jan. 16, 1860, § 2, Sess. Acts 1859-60, p. 382, if the special tax bill issued by the city engineer be not paid within six months after its issue, it will draw interest at the rate of fifteen per cent. per annum from the date of its issue.—*Id.*

S

SALES.

See MORTGAGES AND DEEDS OF TRUST. CONTRACTS. BILLS AND NOTES.

SLAVERY.

6. *Warranty—Contract—Note.*—A note was given in consideration of the sale of a slave, the vendor, by bill of sale, warranting that the slave was a slave for life. Subsequent to the sale, slavery was abolished in this State by the ordinance of the Convention. *Held*, that the covenant did not warrant against the action of the State in abolishing the status of slavery, and that there was no failure in the consideration of the note.—Phillips v. Evans, 305.

SECURITIES.

1. *Discharge—Extension.*—Where the holder of a note gives, for a valuable consideration, to the principal debtor an extension of the time of payment, but reserves to himself the right to sue whenever required by the securities, the securities are not thereby discharged. To discharge the securities, the creditor must do some act, by which he deprives himself of the right of proceeding at law in the collection of the obligation.—Rucker et al. v. Robinson et al., 154.

2. *Discharge of.*—To discharge a surety, the creditor must, by some act or agreement with the principal debtor, so tie his hands as to suspend his right of action, or prevent his bringing suit to enforce the collection of the debt. —McCune v. Belt et al., 281.

3. *Surety.*—The surety is entitled to the benefit of all the securities which the principal debtor gives to the creditor.—*Id.*

4. *Notice to Sue—Penal Bonds—Condition.*—The provisions of the statute relating to securities, R. C. 1845, p. 1454, §§ 1-3, authorizing the security to notify the creditor to sue the principal debtor and other parties liable, do not apply to a security in a penal bond with collateral conditions to secure the performance of the duties of an office, trust, or business, although there be a condition for the payment of moneys. Such bonds are excluded by the provisions of § 4 of the statute.—Ætna Ins. Co. v. Monaghan et als., 432.

5. *Discharge—Note—Deed.*—A contract between the holder of a note and the principal debtor, whereby the time of payment is extended, operates as a release of the surety whenever it can be shown that the contract is founded upon a good and valid consideration. A deed of trust upon land given by the principal debtor in a note after its maturity, providing that no sale of the land should be made to enforce the security until the expiration of eighteen months from the date of the deed, operates as a contract to extend the time of payment.—Smarr v. Schnitter et al., 478.

SET-OFF.

1. *Set-off — Practice.*— The debt due to a partnership cannot be set off against a debt due by an individual partner; but if the goods furnished by the partnership be charged to the individual partner, and are by him furnished to the plaintiff, the debt may be set off against plaintiff's demand.—Lamb v. Brolaski, 51,

2. *Demand — Record — Appeal.* — Upon the trial of a demand against an estate appealed from the Probate or County Court, the cause is to be tried anew upon the record as sent to the Circuit Court. If the administrator fail to set up and file a set-off in the Probate Court, he cannot set it up at the trial in the Circuit Court.—Berry v. Shackelford's Adm'rs, 392.

T

TRESPASS.

Damages—Mortgage.—When the mortgagee has been paid his debt, he cannot sue in trespass to recover damages for waste committed or done prior to the payment.—Kennerly et al. v. Burgess' Adm'r, 440.

U

USES AND TRUSTS.

See MORTGAGES 2, 3, 4, 5, 6, 7, 13, 14.

1. *Resulting Trusts* —Where the purchase money of land is paid by one party and the legal title taken in the name of another, the parties being strangers, a resulting trust arises in favor of the party from whom the consideration proceeds. A similar rule prevails in cases where the consideration proceeds from two or more jointly, and the legal estate is taken in the name of one of them only.—Baumgartner v. Guessfeld et al., 36.

2. *Resulting Trusts—Evidence.*—The admissions of the party holding the legal title are admissible to prove by whom the consideration was paid.—*Id.*

3. *Equity—Note—Description of Payee.*—Where the payee holds a note or instrument in fiduciary capacity, and the purchaser or endorsee has notice of the fact, and also that the trustee is committing a breach of faith, the purchaser will not be protected.—Renshaw v. Wills, 201.

4. *Note — Notice—Equity.*—Where a note executed by the purchaser at a partition sale to "J. S., sheriff," was secured by a deed of trust upon the property sold, if the deed of trust show the consideration of the note, and the endorsee of the sheriff purchasing the note received also the deed of trust which showed the consideration for the note, or knew of the deed when he purchased the note, he will be held to have notice of the fiduciary character of the sheriff, and will not be considered as a holder in good faith. The sheriff in taking the note is a trustee executing a trust devolved upon him by law.—*Id.*

5. *Equities.*—A party receiving notes after they are past due, is put upon inquiry, and will be considered as having taken them with full notice of all the infirmities or equities which attach to them.—Chappell v. Allen et als., 213.

V

VENDORS AND PURCHASERS.

See EQUITY 2, 6, 7. MORTGAGES AND DEEDS OF TRUST.

1. *Trustees—Covenants.*—A trustee undertakes only to convey the title vested in him by the deed giving him the power, and cannot be required to enter into any personal covenants against encumbrances in general. The only covenants which can be required of a trustee executing a mere naked power, is the usual trustee covenant against acts and encumbrances done or suffered by himself.—Barnard v. Duncan, 170.

2. *Mortgages.*—The purchaser at a sale made by a mortgagee or trustee selling under a power to sell for the payment of debts, must take notice of the title and its defects as it appears of record.—*Id.*

3. *Notice of defects of Title—Trustees—Fraud.*—At a sale by a trustee under a power where the facts or means of information concerning the condition and value of the thing sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other or to mislead him, there is no fraud of which the law can take notice; but where material facts

VENDORS AND PURCHASERS *(Continued)*.

are accessible to the vendor only, and he knows them not to be within the diligent attention, observation and judgment of the other party, he is bound to disclose those facts and make them known to the purchaser. The vendor must disclose all material facts of which he knows the vendee to be ignorant. There may be fraud in the suppressing and concealing of material facts, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion.—*Id.*

4. *Mortgages—Auction Sales—Deeds of Trust.*—Where property offered for sale at auction by a trustee in a deed of trust is knocked down to the highest bidder, the sale may be enforced in equity in a suit for a specific performance, or the bidder may be held liable at law for the damages sustained.—Dover v. Kennerly et al., 469.

5. *Mortgage — Trustee's Sale.* — When the purchaser to whom the property is struck off at at a trustee's sale at auction fails to complete his purchase, the property must be re-advertised for sale. (Barnard v. Duncan, *ante* 270.)—*Id.*

VENUE.

Practice — Injunction. — A suit to enjoin the enforcing of a judgment must be brought in the county in which the judgment was rendered; and then if the judge be disqualified, a change of venue may be awarded as in other cases.—State ex rel. Duncan v. Price, 382.

W

WITNESSES.

1. *Assignor.*—An assignor of a note or chose in action is not a competent witness to prove facts occurring prior to the assignment.—Chappell v. Allen et als., 213.

2. *Note—Assignor.*—The assignor of a note is a competent witness to prove the consideration of the assignment—Perry v. Siter et als., 37 Mo. 279, affirmed.—Weil et al. v. Tyler, Garn., &c., 558.